

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Petition of AT&T Inc. for Interim	)	
Declaratory Ruling and Limited Waivers	)	WC Docket No. 08-152
Regarding Access Charges and the "ESP	)	
Exemption"	)	

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**REPLY COMMENTS OF THE  
NEW JERSEY DIVISION OF RATE COUNSEL**

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**I. INTRODUCTION AND SUMMARY**

Pursuant to the Public Notice issued by the Federal Communications Commission ("FCC" or "Commission"),<sup>1</sup> the New Jersey Division of Rate Counsel ("Rate Counsel")<sup>2</sup> hereby submits these reply comments in the above-captioned proceeding.<sup>3</sup>

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<sup>1</sup> / "Petition of AT&T for Interim Declaratory Ruling and Limited Waivers, Pleading Cycle Established," FCC Public Notice, DA 08-1725, July 24, 2008. On August 13, 2008, the Wireline Competition Bureau extended the filing deadline. FCC Public Notice, DA 08-1904.

<sup>2</sup> / Rate Counsel is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. Rate Counsel participates actively in relevant Federal and state administrative and judicial proceedings. The above-captioned proceeding is germane to Rate Counsel's continued participation and interest in implementation of the Telecommunications Act of 1996 ("Act" or "1996 Act"). Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"). The 1996 Act amended the Communications Act of 1934. Hereinafter, the Communications Act of 1934, as amended by the 1996 Act, will be referred to as "the 1996 Act," or "the Act," and all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code.

<sup>3</sup> / Rate Counsel submitted initial comments opposing AT&T's Petition on August 12, 2008. Rate Counsel stated that the FCC should dismiss the Petition or in the alternative require AT&T to supplement the Petition and publish notice in the Federal Register with revised dates for comments and reply comments. Rate Counsel, at 3.

Initial comments urge the Commission to deny AT&T's Petition<sup>4</sup> for diverse and persuasive reasons. The Petition lacks supporting data and studies, would exacerbate opportunities for regulatory arbitrage, would enable AT&T to raise the subscriber line charge ("SLC") selectively in markets with the least competition (harming consumers and competitors), is based on the faulty premise that AT&T is "entitled" to be made whole when any form of intercarrier compensation reform occurs, and would elevate AT&T's specific concerns inappropriately above the Commission's more important goal of completing comprehensive intercarrier compensation reform for the entire industry (as well as addressing other pressing matters such as special access, separations, and universal service).<sup>5</sup> Initial comments demonstrate that the Commission should deny AT&T's Petition for procedural and substantive reasons.

Rate Counsel's comments, submitted in WC Docket No. 08-160, regarding Embarq's petition, similarly opposed incumbent carriers' attempts to be "made whole" and also similarly objected to an individual carrier's attempt to leapfrog its specific concerns to the head of the regulatory line. Rate Counsel's comments, submitted in the Embarq proceeding, apply here as well:

[S]imilar to AT&T's approach, Embarq seemingly seeks to be "made whole" as a result of reform of intercarrier compensation, which means that the Embarq Petition is fundamentally flawed. Rate Counsel concurs with Sprint Nextel in its rejection of "the notion that any carrier or class of carrier is automatically entitled to a guaranteed revenue stream to neutralize the impact of regulatory reforms."

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<sup>4</sup> / Petition of AT&T Inc. for Interim Declaratory Ruling and Limited Waivers, July 17, 2008 ("Petition").

<sup>5</sup> / The vast majority of initial comments recommend that the Commission deny AT&T's Petition. As an example of the minority view, the Independent Telephone & Telecommunications Alliance ("ITTA") states, "ITTA does not oppose AT&T's waiver request to the extent it applies to AT&T alone." ITTA, at 2. The United States Telecom Association ("USTelecom") summarizes its general recommendations on intercarrier compensation reform and regarding AT&T's specific petition simply states: "The Commission should not mandate the particular solutions proposed by AT&T and Embarq for other companies, but rather allow others to volunteer to implement these solutions if adopted for the respective petitioners by the Commission." USTelecom, at 2.

Furthermore, as Sprint Nextel aptly states, carriers provide many services (such as broadband, video, and voice over IP), over networks that carriers have built in part with universal service subsidies and access charges. In any assessment of the need for an alternative recovery mechanism for revenues “foregone” as a result of intercarrier compensation reform, it is important, as Sprint Nextel states “to consider the overall corporate situation.”

Furthermore, although Rate Counsel continues to support the establishment of a rational intercarrier compensation regime, including the payment of access charges by all carriers regardless of the underlying technology that they use, Rate Counsel is not persuaded that Embarq’s Petition (or AT&T’s Petition) requires more urgent attention than other pressing regulatory matters, such as excessive intercarrier special access rates.<sup>6</sup>

Rate Counsel urges the Commission to reject AT&T’s Petition for the reasons set forth in Rate Counsel’s and others’ initial comments, as well as in these reply comments.

## **II. DISCUSSION**

**Rather than examine AT&T’s Petition in isolation, the Commission should complete its comprehensive reform of intercarrier compensation.**

The Commission should complete comprehensive reform of intercarrier compensation rather than grant AT&T’s petition.<sup>7</sup> Rate Counsel concurs with the Massachusetts Department of Telecommunications and Cable (“MTDC”) that “[i]ntercarrier compensation issues should be resolved in a coordinated, comprehensive fashion rather than through company-specific issues” and that carriers’ frustration with the pace of the Commission’s intercarrier compensation proceeding “is not grounds for resorting to inferior processes to gain the reform [carriers] seek.”<sup>8</sup> Rate Counsel shares the concerns expressed by Core Communications, Inc. (“Core”) that AT&T’s Petition is antithetical to the Commission’s stated goal of unifying intercarrier

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<sup>6</sup> / In the Matter of Petition for Waiver of Embarq Local Operating Companies of Sections 61.3 and 61.44-61.48 of the Commission’s Rules, and any Associated Rules Necessary to Permit it to Unify Switched Access Charges Between Interstate and Intrastate Jurisdictions, WC Docket No. 08-160, Rate Counsel comments, August 26, 2008, at 3-4 (footnotes and cites omitted).

<sup>7</sup> / AdHoc Telecommunications Users Committee (“AdHoc”), at 7.

<sup>8</sup> / MTDC, at 2.

compensation rates,<sup>9</sup> because it would create new arbitrage opportunities, further exacerbating the very problems that the pending intercarrier compensation proceeding is seeking to remedy.<sup>10</sup> Furthermore, setting different rates for similar functions, as would be permitted if the Commission grants AT&T's Petition, would be inconsistent with the Commission's efforts to set cost-based rates.<sup>11</sup> As Pac-West Telecomm, Inc. ("Pac-West") states, "it is far more important that this reform be done right than that it be done to meet an unrealistic deadline."<sup>12</sup> There is no urgency to adopt an interim solution.<sup>13</sup> As set forth in the initial comments filed by Rate Counsel and others it is problematic to use the declaratory relief process to resolve "complex, inter-related industry-wide issues."<sup>14</sup> For these reasons, AT&T's petition should be rejected.

**AT&T has failed to provide adequate studies and data in support of its Petition.**

AT&T's Petition should be denied because it lacks technical studies and data, and because AT&T provides no economic or cost basis for offsetting proposed decreases in terminating rates with increases in originating rates.<sup>15</sup> As the Texas Office of Public Utility Counsel ("TOPC") points out, AT&T does not indicate how much it seeks to recover through SLCs or through increased originating access charges.<sup>16</sup> In the absence of such fundamentally relevant information, the Commission should deny AT&T's Petition.

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<sup>9</sup> / Core, at 6; *see also*, TWTC, at 2-3.

<sup>10</sup> / *See also*, Sprint Nextel, at 2, footnote 1 (stating that the Petition would "perpetuate the flawed access charge regime"); NYDPS, at 1-2; Pennsylvania Public Utility Commission ("PaPUC"), at 28-29; COMPTTEL, at 8.

<sup>11</sup> / *See also*, Core, at 7, TWTC at 12-13.

<sup>12</sup> / Pac-West, at 2-3.

<sup>13</sup> / AdHoc, at 4-5.

<sup>14</sup> / MDTC, at 3.

<sup>15</sup> / Core, at 8; COMPTTEL, at 9, footnote 19.

<sup>16</sup> / TOPC, at 4.

**AT&T's Petition would enable AT&T to selectively raise the SLC where it has market power.**

Rate Counsel urges the Commission to heed the concern raised by several parties that AT&T's Petition would improperly enable AT&T to raise the SLC in those markets where consumers have the fewest alternatives.<sup>17</sup> As Rate Counsel has stated in numerous pleadings regarding ILECs' market power, the degree of competition that AT&T confronts varies by geographic and product market.<sup>18</sup> Therefore, AT&T's proposed ability to raise the SLC selectively in markets where it faces less competition would harm consumers and competitors.<sup>19</sup>

Rate Counsel urges the Commission to acknowledge and to consider the fact that where AT&T has had the regulatory freedom to do so, it has raised residential retail rates, including, among others, rates for vertical features.<sup>20</sup> Granting AT&T additional flexibility to further raise rates for residential customers by increasing the SLC would harm consumers and the public interest.

**Major changes in the industry structure have raised the proportion of intracompany traffic.**

Mergers in the wireline market and concentration in the wireless market have led to increased intracompany end-to-end traffic, which has placed non-integrated companies at a disadvantage.<sup>21</sup> Rate Counsel has raised these concerns in its filings in several of the FCC's merger proceedings, noting the ILECs' re-monopolization of long distance markets with the

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<sup>17</sup> / TWTC, at 2; COMPTTEL, at 19-20.

<sup>18</sup> / TWTC., at 5.

<sup>19</sup> / *Id.*, at 5-12. However, Rate Counsel disagrees strongly with TWTC's unsupported assertion that "[i]t is reasonable to permit incumbent LECs to recover foregone intercarrier compensation revenue through increased SLCs.

<sup>20</sup> / *Id.*, at 7, citing California PUC, Division of Ratepayer Advocate, *Report on Rate Increases of Verizon, AT&T, Surewest and Frontier California Following Adoption of the Uniform Regulatory Framework indecision 06-08-030* (July 29, 2008). See also, COMPTTEL, at 17-18 (discussing AT&T's rate increases in Texas).

<sup>21</sup> / AdHoc, at 14.

growing popularity of ILEC's packages and as a result of their acquisition of other ILECs, MCI and legacy AT&T.

**The preservation of historic revenue streams has no place in a purportedly competitive market.**

Initial comments protest AT&T's assumption that it has a "right" to recover intercarrier revenues that it loses as a result of the reform of intercarrier compensation.<sup>22</sup> As TWTC aptly states, "the point of intercarrier compensation reform is to promote efficient market outcomes, *not to protect specific carriers from revenue shortfalls.*"<sup>23</sup> Rate Counsel concurs with TWTC that any assessment of the impact of intercarrier compensation reform "should consider the effect of the reform on the company as a whole, not just the incumbent LEC business."<sup>24</sup>

AdHoc identifies AT&T's contradictory regulatory pursuits. AT&T, in other federal and state proceedings, seeks to depict a purportedly competitive market and, on that basis has sought and gained deregulation, and yet in this proceeding AT&T seeks to be made whole from the results of changing its intercarrier compensation rates to accommodate the changing market.<sup>25</sup> Sprint Nextel raises the concern that [a]lthough AT&T is quick to request access replacement mechanisms ... it is utterly silent about the windfall in additional revenues it stands to gain if it is allowed to assess access charges, rather than bill and keep, reciprocal compensation, or \$.0007 rates, on IP/PSTN traffic."<sup>26</sup> Rate Counsel concurs with COMPTTEL that:

The pro-competitive policies that the Commission has encouraged are designed to force excess revenues from the market, not merely shift them into the prices of other services. Before the Commission may even consider permitting AT&T to increase its federal SLCs and/or originating access rates to offset any voluntary

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<sup>22</sup> / TWTC, at 3.

<sup>23</sup> / *Id.*, at 15 (emphasis in original).

<sup>24</sup> / *Id.*, at 15.

<sup>25</sup> / AdHoc, at 18-19.

<sup>26</sup> / Sprint Nextel, at 7, footnote 10.

reductions to its intrastate rates, the Commission must first determine whether any offsetting revenues are appropriate. AT&T has failed to provide the evidentiary support necessary to make that determination.<sup>27</sup>

**The Commission should flatly reject industry's attempt to "solve" intercarrier compensation disparities by raising the SLC.**

Rate Counsel joins the many comments supporting timely intercarrier compensation reform. However, the consumer should not be required to foot the bill for intercarrier compensation reform. Rate Counsel urges the Commission to reject Sprint Nextel's recommendation that "AT&T . . . be allowed to turn to its own users through increases in its SLCs to the capped levels and reduce the burden it imposes on other carriers through its inflated switched access charges."<sup>28</sup> According to Sprint Nextel, "[c]onsumers will benefit from [the] more rational structure" associated with reduced intrastate access charges and increased SLCs.<sup>29</sup> There is little evidence that carriers flow through reduced access charges to consumers,<sup>30</sup> and, furthermore, as Rate Counsel discusses at length in comments submitted in CC Docket No. 01-92, SLC increases unfairly burden consumers who make few long distance calls. Rate Counsel concurs with the concern of New York Department of Public Service ("NYDPS") that "[t]he consumers' bills would go up and stay up. . . ." and that AT&T's petition "overlooks the inequities of converting from a usage sensitive charge to a flat rate charge- those hit the hardest are likely to be those of limited means that make few calls."<sup>31</sup> There is little consumer benefit in an increased SLC, but there is potential for significant harm, particularly to those with the lowest income. Furthermore, unless and until the Commission examines (as Sprint Nextel indeed

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<sup>27</sup> / COMPTel, at 13.

<sup>28</sup> / Sprint Nextel, at 10.

<sup>29</sup> / *Id.*

<sup>30</sup> / PaPUC, at 26.

<sup>31</sup> / NYDPS, at 3-4; *see also* PaPUC, at 6, and 22-24 (describing declining penetration rates among low-income households).



recommends) *all* aspects of a company's operations (including excessive interstate special access returns, allocation of common loop costs and expenses, etc.), there should be no SLC increases.

**The FCC lacks jurisdiction over intrastate non-nomadic VoIP and over intrastate access charges.**

Rate Counsel concurs with the National Association of Regulatory Utility Commissioners ("NARUC") that the Commission "has *never* found that *non-nomadic* VoIP is subject to federal preemption."<sup>32</sup> Furthermore, as NARUC explains, the FCC cannot use federal funds to reduce intrastate intercarrier compensation charges without making certain separations rules, and, furthermore, any such proposed rule changes must be referred first to the Federal-State Joint Board on Separations.<sup>33</sup> TOPC similarly objects to AT&T's plan to recover "lost *intrastate* access charge revenue through the *interstate* SLC."<sup>34</sup> Several State regulators oppose the proposed preemption of state regulation of intrastate access charges.<sup>35</sup> PaPUC states, "[f]ederal preemption of intrastate ratemaking is not a principle that has been condoned, and should not be lightheartedly applied in the instant proceeding."<sup>36</sup>

### III. CONCLUSION

Rate Counsel reiterates its initial position that the Petition should be dismissed for each of the three reasons offered.<sup>37</sup> These reasons are (1) AT&T is seeking duplicative relief now being

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<sup>32</sup> / NARUC, at 2.

<sup>33</sup> / *Id.*, at 3; *see also* PaPUC, at 11.

<sup>34</sup> / TOPC, at 5 (emphasis in original).

<sup>35</sup> / NYDPS, at 2-3; PaPUC, at 5-6.

<sup>36</sup> / PaPUC, at 15, citing *Louisiana v. FCC*, 476 U.S. 355, 368, 90 L.Ed. 369 (1986).

<sup>37</sup> / Rate Counsel, at 3-5

considered in the IP-Enabled Services proceeding,<sup>38</sup> (2) the Petition is not complete as filed and lacks essential information so as to preclude review and comment, and (3) AT&T did not exhaust other administrative remedies that would afford appropriate relief, the filing of a Section 208 complaint.

If the Petition is not dismissed, the Commission should require AT&T to supplement the Petition with additional data and support, and the Commission should proceed by notice of proposed rulemaking and consider such Petition as part of such rulemaking.

If changes to the rules adopted in the *CALLS Order* are to be considered, the FCC should proceed by issuance of a notice of proposed rulemaking so that full public participation is possible. The Petition seeks to modify the *CALLS Order* and therefore such action requires a notice of proposed rulemaking. AT&T proposes to hijack the *interstate* SLC as a way to recover foregone *intrastate* access revenues: transforming the SLC from its original purpose of recovering the interstate portion of the fixed loop cost into a revenue recovery mechanism for foregone intrastate revenues. This would represent a fundamental departure from the FCC's jurisdictional separations rules and from the FCC's *CALLS Order*. AT&T's proposal to raise the interstate originating switched access charge is a modification to the *CALLS Order*, that impacts the rates consumer are charged. Such changes should not be made absent rulemaking

As aptly stated by the NYDPS, "AT&T's proposals infringe on regulation reserved to the states and improperly shift the burden of termination costs from carriers to consumers, with no guarantees consumers will benefit from the changes."<sup>39</sup> AT&T's petition for a declaratory ruling should be denied.

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<sup>38</sup> / See also, COMPTTEL, at 5.

<sup>39</sup> / NYDPS, at 1.

Respectfully submitted,

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